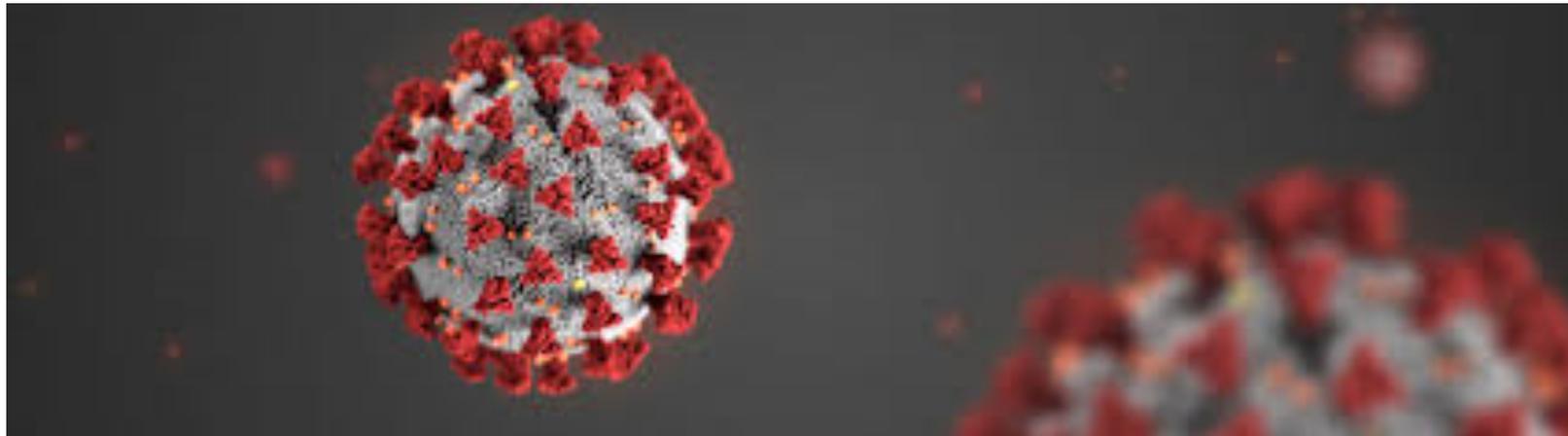


The Families First Coronavirus Response Act, Employer Impacts and Municipal Operations

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Course Presenters

Mr. Gerber is a partner with the law firm of Siana Law, LLP located in Chester Springs, Pennsylvania. Mr. Gerber advises private employers, public employers and their police departments involved in civil rights litigation as well as labor and employment matters before all levels of the federal and state court system. He is admitted to practice law in the state courts of Pennsylvania and New Jersey as well as the United States District Courts for the Eastern, Middle and Western Districts of Pennsylvania. Mr. Gerber received his J.D. from Widener University School of Law and his B.A. from Penn State University. Mr. Gerber has been recognized as a "Rising Star" by Super Lawyers magazine. He represents numerous municipal police departments and conducts seminars before a variety of audiences, including the Pennsylvania Bar Institute, Chiefs of Police Associations, insurance carriers, municipal solicitors, and statewide legal education programs



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A Primer for Small Businesses and Employees on
Compliance with the Extended Paid Leave and
Emergency FMLA Leave Acts

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TOPICS ADDRESSED IN THIS WEBINAR:

Selected Provisions of the Extended Paid Leave & Emergency FMLA Leave Acts that entail:

- Notice Requirements
- Eligibility
- Exemptions
- Documentation
- Record keeping
- Violations and Remedies

Emergency Paid Sick Leave Act (EPSLA)

- ▶ Private employers with fewer than 500 employees, as well as public agencies with one or more employees, must comply with the EPSLA
- ▶ The EPSLA requires employers to provide paid sick leave to employees who are unable to work for six reasons having to do with COVID-19 where the employee:
 - (1) is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
 - (2) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
 - (3) is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
 - (4) is caring for an individual who is subject to an order as described in (1), or who has been advised as described in (2);
 - (5) is caring for his or her son or daughter whose school or place of care has been closed or whose child care provider is unavailable due to COVID-19 related reasons; or
 - (6) is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Emergency Family and Medical Leave Expansion Act (EFMLEA)

- Employers must provide expanded paid family and medical leave to eligible employees who are unable to work because the employee is caring for his or her son or daughter whose school or place of care is closed or whose child care provider is unavailable due to a public health emergency, defined as an emergency with respect to COVID-19, declared by a Federal, State, or local authority.
- Private employers with fewer than 500 employees must comply with the EFMLEA,
- Employers with fewer than 50 employees may be exempt from EFMLEA's requirements when compliance with the EFMLEA would “jeopardize the viability of the business as a going concern.”
- The EFMLEA applies to employees of covered employers if such employees have been employed by the employer for at least 30 calendar days.

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EFMLEA Continued

- An employee is entitled to take up to **twelve weeks of leave**
- The first two weeks (usually ten workdays) of this leave are unpaid, though an employee may substitute paid sick leave under the EPSLA or paid leave under the employer's preexisting policies for these two weeks of unpaid leave.
- Unlike FMLA leave taken for other reasons, the following period of up to ten weeks of expanded family and medical leave must be paid.
- After the first two weeks of leave, expanded family and medical leave under the FFCRA must be paid at two-thirds the employee's regular rate of pay.
- For each day of leave, the employee receives compensation based on the number of hours he or she would otherwise be normally scheduled to work, although special rules may apply to employees with varying schedules.
- An eligible employee may elect to use, or an employer may require that an employee use, such expanded family and medical leave concurrently with any leave offered under the employer's policies that would be available for the employee to take to care for his or her child, such as vacation or personal leave or paid time off.

EFMLEA Continued

- The total EFMLEA payment per employee for this ten-week period is **capped at \$200 per day and \$10,000 in the aggregate, for a total of no more than \$12,000 when combined with two weeks of paid leave taken under the EPSLA.**
- “**Telework**”— is no less work than if it were performed at an employer's worksite. As a result, employees who are teleworking for COVID-19 related reasons must always record—and be compensated for—all hours actually worked, including overtime, in accordance with the requirements of the FLSA. See 29 CFR 785.11-13;
- However, an employer is not required to compensate employees for unreported hours worked while teleworking for COVID-19 related reasons, unless the employer knew or should have known about such telework.
- The FFCRA and regulations encourage employers and employees to implement **highly flexible telework arrangements** that allow employees to perform work, potentially at unconventional times, while tending to family and other responsibilities, such as teaching children whose schools are closed for COVID-19 related reasons.

Paid Leave Entitlements

- Quarantine or isolation orders include a broad range of governmental orders, including orders that advise some or all citizens to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility.
- An employee may take paid sick leave only if being subject to one of these orders prevents him or her from working or teleworking as described therein. The question is whether the employee would be able to work or telework “but for” being required to comply with a quarantine or isolation order.
- An employee subject to one of these orders may not take paid sick leave where the employer *does not have work for the employee.*

Paid Leave Entitlements Continued

- The employee may be eligible for state unemployment insurance and should contact his State workforce agency or State unemployment insurance office for specific questions about his eligibility.
- The second reason for paid sick leave applies where an employee is unable to work because he or she has been advised by a health care provider, as defined in 29 CFR 825.102, to self-quarantine for a COVID-19 reason.
- Advice to self-quarantine must be based on the health care provider's belief that the employee has COVID-19, may have COVID-19, or is **particularly vulnerable** to COVID-19.
- And, self-quarantining must prevent the employee from working. An employee who is self-quarantining is able to telework, and therefore may not take paid sick leave for this reason, if (a) his or her employer has work for the employee to perform; (b) the employer permits the employee to perform that work from the location where the employee is self-quarantining; and (c) there are no extenuating circumstances, such as serious COVID-19 symptoms, that prevent the employee from performing that work.

Paid Leave Entitlements Continued

- **Symptoms** that could trigger this are: Fever, dry cough, shortness of breath, or other COVID-19 symptoms identified by the U.S. Centers for Disease Control and Prevention (CDC).
- Additionally, paid sick leave taken for this reason must be limited to the time the employee is unable to work because he or she is taking affirmative steps to obtain a medical diagnosis. Thus, an employee experiencing COVID-19 symptoms may take paid sick leave, for instance, for time spent making, waiting for, or attending an appointment for a test for COVID-19.
- The employee may not take paid sick leave to **self-quarantine** without seeking a medical diagnosis. An employee who is waiting for the results of a test is able to telework, and therefore may not take paid sick leave, if: (a) His or her employer has work for the employee to perform; (b) the employer permits the employee to perform that work from the location where the employee is waiting; and (c) there are no extenuating circumstances, such as serious COVID-19 symptoms, that may prevent the employee from performing that work.
- An employee may continue to take leave while experiencing any of the symptoms specified at § 826.20(a)(4), however; or may continue to take leave after testing positive for COVID-19, regardless of symptoms experienced, provided that the health care provider advises the employee to self-quarantine.

Paid Leave Entitlements Continued

- The fourth reason for paid sick leave applies where an employee is unable to work because he or she needs to care for an individual who is either: (a) Subject to a Federal, State, or local quarantine or isolation order; or (b) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- This qualifying reason applies only if but for a need to care for an individual, the employee would be able to perform work for his or her employer. Accordingly, an employee caring for an individual may not take paid sick leave if the employer does not have work for him or her.
- The employee must have a genuine need to care for the individual. Paid sick leave may not be taken to care for someone with whom the employee has no personal relationship. Rather, the individual being cared for must be an **immediate family member, roommate, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she self-quarantined or was quarantined.** Additionally, the individual being cared for must: (a) Be subject to a Federal, State, or local quarantine or isolation order as described above; or (b) have been advised by a health care provider to self-quarantine based on a belief that he or she has COVID-19, may have COVID-19, or is particularly vulnerable to COVID-19.

Paid Leave Entitlements Continued

- The fifth reason for paid sick leave applies when the employee is unable to work because the employee needs to care for his or her son or daughter if: (a) The child's school or place of care has closed; or (b) the child care provider is unavailable, due to COVID-19 related reasons. Again, the employee must be able to perform work for his or her employer but for the need to care for his or her son or daughter, which means an employee may not take paid sick leave if the employer does not have work for him or her. Moreover, an employee may take paid sick leave to care for his or her child only when the employee needs to, and actually is, caring for his or her child. Generally, an employee does not need to take such leave if another suitable individual—such as a co-parent, co-guardian, or the usual child care provider—is available to provide the care the employee's child needs.
- The sixth reason for paid sick leave applies if the employee is unable to work because the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Full Time vs. Part Time Employment

- The EPSLA does not define what it means to be a “full-time” or “part-time” employee. Because paid sick leave is designed to provide leave “over a 2-week period,” and the EPSLA provides up to 80 hours of such leave to full-time employees, the Department believes a full-time employee is an employee who works at least 80 hours over two workweeks, or at least 40 hours each workweek.
- As a result, the Department defines a full-time employee as an employee who is normally scheduled to work at least 40 hours each workweek
- the average hours per workweek for an employee who does not have a normal weekly schedule should be calculated over the *six-months* prior to the date on which leave is requested to determine if he or she is a full-time employee.
- If the employee has been employed for less than six months, the average hours per workweek is computed over the entire period of employment.
- a part-time employee is an employee who is normally scheduled to work fewer than 40 hours each workweek or—if the employee lacks a normal weekly schedule—who is scheduled to work, on average, fewer than 40 hours each workweek. Under § 826.21(b)(1), a part-time employee who works a normal schedule is entitled to paid sick leave equal to the number of hours he or she is normally scheduled to work over a two-workweek period.

Full Time vs. Part Time Employment Continued

- As discussed above, the Department believes that a part-time employee whose weekly work schedule varies should be entitled to paid sick leave equal to fourteen times the average number of hours that the employee was scheduled to work per calendar day over the six-month period ending on the date on which the employee takes paid sick leave, including hours for which the employee took leave of any type. This computation is possible only if the employee has been employed for at least six months. Thus, § 826.21(b)(2) provides variable-schedule part-time employees with such an amount of paid sick leave.
- The amount an employer is required to pay is capped at \$511 per day of paid sick leave taken and \$5,110 in total per covered employee for all paid sick leave pay. Furthermore, where an employee is taking paid sick leave at two-thirds pay, the amount of pay is subject to a lower cap of \$200 per day of leave and \$2,000 in total per covered employee for all paid sick leave that is paid at two-thirds pay.
- Because the FFCRA amends the FMLA, and in particular references Section 102(d)(2)(B) of the FMLA, § 826.23 explains that an employee may elect to use, or an employer may require an employee to use, accrued leave that under the employer's policies would be available to the employee to care for a child, such as vacation or personal leave or paid time off concurrently with the expanded family and medical leave under the EFMLEA

Who are “employees”?

- The employer should include full-time and part-time employees, employees on leave, temporary employees who are jointly employed by the employer and another employer, and day laborers supplied by a temporary placement agency.
- Independent contractors that provide services for an employer do not count towards the 500-employee threshold. Nor do employees count who have been laid off or furloughed and have not subsequently been reemployed.
- Employees must be employed within the United States. For example, if an employer employs 1,000 employees in North America, but only 250 are employed in a U.S. State, the District of Columbia, or a territory or possession of the United States, that employer will be considered to have 250 employees and is thus subject to the FFCRA.
- For-profit and non-profit entities must comply with the FFCRA if they otherwise meet the requirements for coverage.

Small Employer Exemption

Private employers with **fewer than 50 employees** do not have to provide an employee with paid sick leave and expanded family and medical leave to care for his or her child whose school or place of care is closed, or child care provider is unavailable, when such leave would *jeopardize the viability of the business as a going concern*.

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Small Employer Exemption

Section 826.40(b)(1) explains that a small employer is exempt from the requirement to provide such leave when:

- (1) Such leave would cause the small employer's expenses and financial obligations to exceed available business revenue and cause the small employer to cease operating at a minimal capacity;
- (2) the absence of the employee or employees requesting such leave would pose a substantial risk to the financial health or operational capacity of the small employer because of their specialized skills, knowledge of the business, or responsibilities; or
- (3) the small employer cannot find enough other workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services the employee or employees requesting leave provide, and these labor or services are needed for the small employer to operate at a minimal capacity.

For reasons (1), (2), and (3), the employer may deny paid sick leave or expanded family and medical leave only to those otherwise eligible employees whose absence would cause the small employer's expenses and financial obligations to exceed available business revenue, pose a substantial risk, or prevent the small employer from operating at minimum capacity, respectively.

Small Employer Exemption

If a small employer decides to deny paid sick leave or expanded family and medical leave to an employee or employees whose child's school or place of care is closed, or whose child care provider is unavailable, the small employer must document the facts and circumstances that meet the criteria set forth in § 826.40(b)(1) to justify such denial. The employer should not send such material or documentation to the Department, but rather should retain such records for its own files.

PUBLIC AGENCIES

- A “public agency” means the Government of the United States; the government of a State or political subdivision of a State; or an agency of the United States (including the United States Postal Service and Postal Regulatory Commission), a State, or a political subdivision of a State; or any interstate governmental agency.
- All covered public agencies must comply with both the EPSLA and the EFMLEA regardless of the number of employees they employ, although such employers may exclude employees who are health care providers or emergency responders as described in § 826.30(c).

Health Care Providers

Health care provider is anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

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Emergency Responders

For the purposes of employees who may be excluded from paid sick leave or expanded family and medical leave by their employer under the FFCRA, an emergency responder is an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.

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NOTICE

As required by the FFCRA, the Department made a model notice available on March 25, 2020, and employers may, free of charge, download the poster (WHD1422 REV 03/20) from the WHD website at <https://www.dol.gov/whd>.

In addition to posting the notice in a conspicuous place where employees or job applicants at a worksite may view it, an employer may distribute the notice to employees by email, or post the required notice electronically on an employee information website to satisfy the FFCRA requirement.

An employer may also directly mail the required notice to any employees who are not able to access information at the worksite, through email, or online.

DOCUMENTATION

- An employee must provide his or her employer documentation in support of paid sick leave or expanded family and medical leave. Such documentation must include a signed statement containing the following information:
 - (1) The employee's name;
 - (2) the date(s) for which leave is requested;
 - (3) the COVID-19 qualifying reason for leave; and
 - (4) a statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason.
- An employee must provide *additional documentation* depending on the COVID-19 qualifying reason for leave.
- An employee requesting paid sick leave under § 826.20(a)(1)(i) must provide the name of the government entity that issued the quarantine or isolation order to which the employee is subject.

DOCUMENTATION Continued

An employee requesting paid sick leave under § 826.20(a)(1)(ii) must provide the name of the health care provider who advised him or her to self-quarantine for COVID-19 related reasons. An employee requesting paid sick leave under § 826.20(a)(1)(iv) to care for an individual must provide either

- (1) the government entity that issued the quarantine or isolation order to which the individual is subject or
- (2) the name of the health care provider who advised the individual to self-quarantine, depending on the precise reason for the request.

An employee requesting to take paid sick leave under § 826.20(a)(1)(v) or expanded family and medical leave to care for his or her child must provide the following information:

- (1) The name of the child being care for;
- (2) the name of the school, place of care, or child care provider that closed or became unavailable due to COVID-19 reasons; and
- (3) a statement representing that no other suitable person is available to care for the child during the period of requested leave.

Health Care Coverage

An employee who takes expanded family and medical leave or paid sick leave is entitled to continued coverage under the employer's group health plan on the same terms as if the employee did not take leave.

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Return to Work

- In most instances, an employee is entitled to be restored to the same or an equivalent position upon return from paid sick leave or expanded family and medical leave in the same manner that an employee would be returned to work after FMLA leave. See the FMLA job restoration provisions at 29 CFR 825.214 and the FMLA equivalent position provisions at 29 CFR 825.215.
- However, the new statute does not protect an employee from employment actions, such as layoffs, that would have affected the employee regardless of whether the leave was taken. The employer must be able to demonstrate that the employee would have been laid off even if he or she had not taken leave. This provision tracks the existing provision under the FMLA in 29 CFR 825.216. The employer has the same burden of proof to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment.

Return to Work

- The EFMLEA amendments to the FMLA specify that the FMLA's restoration provision in 29 U.S.C. 2614(a)(1) does not apply to an employer who has **fewer than twenty-five employees** if all four of the following conditions are met:
 - (a) The employee took leave to care for his or her son or daughter whose school or place of care was closed or whose child care provider was unavailable;
 - (b) The employee's position no longer exists due to economic or operating conditions that (i) affect employment and (ii) are caused by a public health emergency (i.e., due to COVID-19 related reasons) during the period of the employee's leave;
 - (c) The employer made reasonable efforts to restore the employee to the same or an equivalent position; and
 - (d) If the employer's reasonable efforts to restore the employee fail, the employer makes reasonable efforts for a period of time to contact the employee if an equivalent position becomes available. The period of time is specified to be one year beginning either on the date the leave related to COVID-19 reasons concludes or the date twelve weeks after the employee's leave began, whichever is earlier.

N. Recordkeeping

- An employer is required to retain all documentation for four years, regardless of whether leave was granted or denied.
- If an Employee provided oral statements to support his or her request for paid sick leave or expanded family and medical leave, the employer is required to document and retain such information for four years.
- If an employer denies an employee's request for leave pursuant to the small business exemption under § 826.40(b), the employer must document its authorized officer's determination that the prerequisite criteria for that exemption are satisfied and retain such documentation for four years.
- Section 826.140 also explains what documents the employer should create and retain to support its claim for tax credits from the Internal Revenue Service (IRS). A more detailed explanation of how Employers may claim tax credits can be found at <https://www.irs.gov/forms-pubs/about-form-7200> and <https://www.irs.gov/pub/irs-drop/n-20-21.pdf>.

Prohibited Acts and Enforcement

- Employers are prohibited from discharging, disciplining, or discriminating against any employee because the employee took paid sick leave, initiated a proceeding under or related to paid sick leave, or testified or is about to testify in such a proceeding.
- An employer who violates the paid sick leave requirements is considered to have failed to pay the minimum wage required by section 6 of the FLSA, and an employer who violates the prohibition on discharge, discipline, or discrimination
- An employee may recover an amount equal to the federal minimum wage for each hour of paid sick leave denied, an additional equal amount as liquidated damages, and an amount for costs and reasonable attorney's fees.
- Moreover, the Secretary may bring an action against an employer to recover an amount equal to the Federal minimum wage for each hour of paid sick leave denied, and an additional equal amount as liquidated damages, or to obtain an injunction against the employer.
- In the case of a repeated or willful violation, the employer shall also be subject to a civil penalty for each violation, and liable in an additional amount, as liquidated damages, equal to the minimum wage for each hour of paid sick leave denied.
- Employees may file complaints alleging violations of the EPSLA and/or the EFMLEA with the Wage & Hour Division

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EEOC TECHNICAL ASSISTANCE PUBLICATION

- ▶ https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm
- ▶ During a pandemic, employers may ask employees if they are experiencing symptoms of the virus; such symptoms include fever, chills, cough, shortness of breath, or sore throat.
- ▶ Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

EEOC TECHNICAL ASSISTANCE PUBLICATION

- ▶ Does the ADA allow employers to require employees to stay home if they have symptoms of the COVID-19?
- ▶ Yes. The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not interfere with employers following this advice.

EEOC TECHNICAL ASSISTANCE PUBLICATION

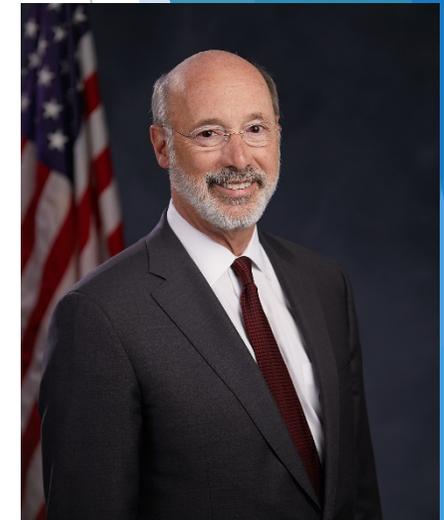
- ▶ When employees return to work, does the ADA allow employers to require a doctor's note certifying fitness for duty? (3/17/20)
- ▶ Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees. As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.

EEOC TECHNICAL ASSISTANCE PUBLICATION

- ▶ May an employer store in existing medical files information it obtains related to COVID-19, including the results of taking an employee's temperature or the employee's self-identification as having this disease, or must the employer create a new medical file system solely for this information? (4/9/20)
- ▶ The ADA requires that all medical information about a particular employee be stored separately from the employee's personnel file, thus limiting access to this confidential information. An employer may store all medical information related to COVID-19 in existing medical files. This includes an employee's statement that he has the disease or suspects he has the disease, or the employer's notes or other documentation from questioning an employee about symptoms.

Coronavirus Impacts on Municipal and Business Operations

- ▶ Governor Wolf Shutdown Orders, Waiver Bonanza & Pullback
 - ▶ <https://www.scribd.com/document/452553026/UPDATED-4-00pm-April-1-2020-Industry-Operation-Guidance>
- ▶ State Guidance/Directives - all UCC permit deadlines are suspended and direction to cease inspections for non-essential/non-life sustaining permit applications
 - ▶ Impact?
 - ▶ Waiver and Certification Forms



Coronavirus Impacts on Municipal and Business Operations - Legislative Answers

Senate Bill 841 - but limited!

- ▶ Municipal Impacts

- ▶ Meetings, Zoning Hearings and Compliance with the Sunshine Act
 - ▶ Ability to hold remote meetings
 - ▶ Notice requirement - newspaper and website
 - ▶ Phone and Videoconferencing
 - ▶ Public participation

Coronavirus Impacts on Municipal and Business Operations - Legislative Answers

Senate Bill 841 - but limited!

- ▶ Municipal Impacts

- ▶ Permit Deadlines

- ▶ Suspended/tolled - 30 days after effective date
 - ▶ Applicant/landowner may request hearing/proceedings to move forward within that 30 days. Discretion of municipality to do so (within the 30 days).

Coronavirus Impacts on Municipal and Business Operations - Legislative Answers

Senate Bill 841 - but limited!

- ▶ Business Impacts

- ▶ E-Notarization

- ▶ Department-approved technologies
 - ▶ 30 day notice to Department if otherwise
 - ▶ AV recording of execution
 - ▶ Expires 60 days after coronavirus orders lifted

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Coronavirus Impacts on Municipal and Business Operations - Legislative Answers

- ▶ Other Impacts
 - ▶ Trash and Recycling
 - ▶ Paving projects
 - ▶ Scope of essential services

Thank you.

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